Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-404

ILLINOIS BRICK COMPANY, ET AL., *Petitioners*,

vs.

STATE OF ILLINOIS, ET AL., *Respondents*.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA AND THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL AS AMICI CURIAE

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BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA, AND THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL AS AMICI CURIAE

INTEREST OF AMICI CURIAE

The States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island and Providence Plantations, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming and the Commonwealths of Pennsylvania and Virginia respectfully submit this

brief *amici curiae* pursuant to Supreme Court Rule 42(4). *Amicus* National Association of Attorneys General respectfully submits this brief with the consent of all parties to this case pursuant to Supreme Court Rule 42(2).

Within our federal system, the 50 States play an important role in antitrust enforcement. In their proprietary capacities, for example, the *amici* States purchase a wide range of goods and products. In 1973 alone, the 50 States and their political subdivisions spent approximately $75.7 billion for goods and services. Council of State Governments, State and Local Purchasing 1.1 (1975). As the actual users of these goods and services, the *amici* ultimately bear most — if not all — of the burden of any unlawful overcharges which are imposed in the chain of distribution. To vindicate their interests as actual users of over-priced goods and services and to enforce state and federal antitrust laws, the 50 States have vigorously prosecuted antitrust damage actions, including actions in the following industries: ampicillin, asphalt, automobile fleet sales, brass mill tubing, bread, cast iron pipe, cement, children's books, gypsum wallboard, master key systems, milk, plumbing fixtures, sugar, and tetracycline. *See* National Association of Attorneys General, State Antitrust Laws and Their Enforcement 4 (1974).

In addition, Congress has assigned to the States considerable responsibilities for enforcement of the federal antitrust laws. In the Crime Control Act of 1976, Pub. L. No. 94-503, § 116 (Oct. 15, 1976), for example, Congress authorized appropriations of $10 million per year for antitrust enforcement by State

Attorneys General. Further, Congress has empowered State Attorneys General to sue as parens patriae to recover damages for violations of the Sherman Act on behalf of citizens of the respective States. Pub. L. No. 94-435, § (Sept. 30, 1976).

Accordingly, the *amici* States have direct and substantial interests in both their proprietary and sovereign capacities in their ability to obtain legal redress for injuries they and their citizens suffer by reason of antitrust violations.

Amicus National Association of Attorneys General also has a significant interest in this litigation. The membership of the National Association of Attorneys General consists of the Attorney General of each state and territory. The Association exists to facilitate and nuture the effective conduct of the office of Attorney General and to provide a means of its members to speak jointly on issues.

QUESTION PRESENTED

Does the actual user of a product the price of which was conspiratorially increased state a claim for relief under section 4 of the Clayton Act even though he bought through a middleman rather than directly from the alleged conspirator?

STATEMENT OF THE CASE

Petitioners are concrete block manufacturers who are charged with conspiring to fix the price of the concrete block they sell. App. 8-11. Respondents purchase concrete block from petitioners through masonry contractors and general contractors. The amount ultimately paid by owner-builders for concrete block

used in buildings and other structures can be readily determined.[1]

Illinois sued the concrete block manufacturers to recover the alleged overcharges for concrete block it paid as an owner-builder. App. 6. Other treble damage actions were filed by masonry contractors, general contractors and other owner-builders in addition to the State of Illinois. App. 205. All of these other cases eventually were settled. *Ibid.*

On petitioners' motion, discovery was stayed by the District Court (App. 201-03, 208) to allow petitioners to move for summary judgment on the legal ground that only those in privity with a price-fixer could assert a claim for relief. The District Court rejected this broad argument but nonetheless granted the summary judgment motion. *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461 (N.D. Ill. 1975). The District Court reasoned that a purchaser "who obtains goods from the manufacturer or from a [middleman] but who in either case acquires the goods in the same condition as originally made and sold by the manufacturer" could assert a claim for relief but one "who obtains a finished product from a middleman that has altered or added to the

[1] In the Lake County Nursing Home project, for example, the owner-builder paid $23,566 for concrete block. App. 235. The amount paid for concrete block in other projects presumably could be determined through the records of masonry and general contractors but since discovery was stayed upon petitioners' motion (App. 201-03, 208), this evidence has not yet been adduced. In any event, it is necessary to interpret the record most favorably for respondents since this case comes here on petitioners' motion for summary judgment.

goods" could not.[2] *Id.*, at 466. Despite the fact that the block purchased by Illinois was the same block that left petitioners' plants and even though Illinois could demonstrate the amount paid for the block, the District Court ruled that Illinois could not assert a claim for its injury and therefore granted the block manufacturers' motion for summary judgment.

The Seventh Circuit reversed. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976). The Court of Appeals held that the actual users of conspiratorially priced products could assert claims under section 4 of the Clayton Act even if they purchased through middlemen. The Court also ruled that the actual amount of damages was a question of fact on which the parties were entitled to conduct discovery and proceed to trial.

This case is here on a petition for a writ of certiorari which this Court granted. 97 S. Ct. 352 (1976).

SUMMARY OF ARGUMENT

Section 4 of the Clayton Act, 15 U.S.C. § 15, reaches broadly to protect any antitrust victim "injured in his business or property." The purchaser of a conspiratorially priced product or commodity should be entitled to assert a claim for relief without regard to whether he purchased directly from the price-fixers or through

[2] The District Court based this distinction upon a student commentary (67 F.R.D., at 466 n.3), even though that commentary had concluded that claims such as Illinois' should proceed to trial: "[T]he courts should allow all levels of consumer plaintiffs to attempt to establish at trial the fact of their damages rather than bar them at the outset from seeking to prove their injuries." Comment, 72 Colum. L. Rev. 394, 414 (1972)

a middleman and without regard to whether that conspiratorially priced product or commodity may have been combined with some other product in the production process. In contrast, where the plaintiff purchased neither the conspiratorially priced product nor something containing that conspiratorially priced product, he may not be allowed to assert a claim. In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), this Court acknowledged this distinction, recognizing that the plaintiff could assert a claim for over-priced gasoline it actually purchased but denying recovery where the injury alleged was an indirect one to the State's general economy resulting from over-priced gasoline. So, too, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), where the claim of a purchaser of unlawfully priced machinery was allowed. If, by contrast, a purchaser of shoes had sued it would necessarily have been on the basis of indirect injury resulting from overcharges for machinery used to make the shoes rather than from any overcharge in the shoes themselves and no recovery would have been permitted.

Once the threshold question of entitlement to sue is resolved, the decisions of this Court and the experience in the lower courts demonstrate the relative ease of proof of damages. Antitrust plaintiffs need only present evidence from which "a just and reasonable inference" of the amount of damages can be made "although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Nor does tracing overcharges through a number of levels of a distribution system present any insuperable evidentiary issues because this

Court has expressly approved treble damage jury verdicts based on such evidence. *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). Indeed, even under the unrealistically rigid standard advanced by petitioners, the State of Illinois is entitled to proceed to trial with its claim and certainly should not have had its claim dismissed on a summary judgment motion before it had the opportunity to complete discovery.

Recognizing that all purchasers of conspiratorially priced goods have claims against the price-fixers is the only rule which serves the dual policies of deterrence against antitrust violators and the compensation of those actually injured. If petitioners' arbitrary limitations were adopted, they would deny relief to purchasers who suffered the greatest injury and who are therefore most likely to vindicate the public interest in antitrust enforcement. Petitioners' argument, moreover, would deny relief to all purchasers but those who had immediate dealings with price-fixers and who — because of mark-up pricing practices — may actually have profited from the conspiracy. Such purchasers would be improbable ones upon whom to place the entire burden of private antitrust enforcement since their ongoing business relationships and their own profits could be threatened if they brought suit. Permitting all injured purchasers to recover for their injuries does not open the door to duplicative recoveries. The fact that there is no reported instance where a defendant has complained of an actual duplicative antitrust damage award demonstrates that the lower courts and counsel have successfully utilized recognized procedures to avoid this spectre.

ARGUMENT

I

PURCHASERS OF PRICE-FIXED PRODUCTS ARE ENTITLED TO PRESENT PROOF OF DAMAGES EVEN IF THEY DO NOT STAND IN PRIVITY WITH THE ALLEGED CONSPIRATORS

A. Section 4 of the Clayton Act Affords Broad Relief to Antitrust Victims Injured in Their "Business or Property"

Section 4 of the Clayton Act, 15 U.S.C. § 15, vests antitrust victims with the right of recovery:

> Any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

It is difficult to conceive of language broader than the words "any person" and, indeed, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948), this Court emphasized the breadth to be given these words:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Nor is the phrase "business or property" one which is to be given a narrow reading. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906), was a suit by a municipality for overcharges in pipe purchased for its waterworks system.[3] There, this Court held, "[The city] was injured in its property . . . by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.*, at 396.

Section 4 is not to be limited through technical or artificial interpretations. Section 4, after all, was designed to "protect the victims of the forbidden practices as well as the public." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). "In the face of such a policy, this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Ibid.*

B. All Purchasers of Unlawfully Priced Products Are Within the Foreseeable "Target Area" of Injury and Are Entitled to Redress Under Section 4

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[3] Petitioners cite *Chattanooga Foundry* as a case in which this Court held "that the first purchaser of a price-fixed product is the proper party to recover for the overcharge." Pet. Br. 9. With all due respect, petitioners misstate the holding of *Chattanooga Foundry*. This Court attached no importance to whether the City of Atlanta purchased directly from the price-fixer or through a middleman and, instead, upheld the city's claim simply because it was "led to pay more than the worth of the pipe." 203 U.S., at 396. Indeed, there was no "privity" between plaintiff and the defendants because the city had purchased from the Anniston Pipe & Foundry Company which was not even named as a defendant. The Circuit Court of Appeals, in fact, commented, "[T]hat [Atlanta] is not suing that corporation [from which it purchased] is of no vital significance." *Atlanta v. Chattanooga Foundry & Pipe Works*, 127 F. 23, 25 (6th Cir. 1903), *aff'd* 203 U.S. 390 (1906).

Petitioners ignore this Court's guidelines for the interpretation of section 4 and argue instead for resurrection of the outdated concept of privity. Under petitioners' view, only those who dealt directly with the price-fixers are entitled to recover for their injuries. The requirement of privity, however, was rejected in Congress when the Sherman Act was enacted and the lower courts have consistently refused to adopt this archaic talisman. Recovery for antitrust violations does not depend on outdated and empty formalisms such as privity. Rather, the appropriate inquiry is whether the plaintiff comes within the "target area" of the alleged violation and under that standard all purchasers of conspiratorially priced products are entitled to assert their claims for relief.

1. *The Congress which enacted the Sherman Act intended to extend relief to actual users and not simply to middlemen.* Section 4 of the Clayton Act was originally enacted as section 7 of the Sherman Act of 1890. The evils which the 51st Congress sought to proscribe by the Sherman Act were the great trusts of the day such as the Sugar Trust and the Beef Trust. The 51st Congress recognized that individual consumers were the ones primarily injured by these trusts. Even though individual consumers of sugar, for example, obviously did not purchase directly from the trust, *see United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), Congress intended that they be able to bring damage actions against the price-fixers. The sponsors of this seminal legislation therefore intended that it afford relief to the actual users or ultimate consumers of conspiratorially priced products and not simply to middlemen. Indeed, the debate over the damage remedy centered on means to ease the procedural burdens of consumers rather than on whether they would be entitled to assert claims in the first instance.

In explaining who was "injured" within the meaning of the damage remedy, Senator George, for example, included the ultimate consumer or actual user:

> An advance in the price to the middleman is not mentioned in the bill for the obvious reason that no such advance would damnify them; it would rather be of benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profits on a subsequent sale. So whatever he pays he receives when he sells, together with the profit on his investment; and so on all of them; including the last, who sells directly to the consumer. The consumer, therefore, paying all its increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured. 21 Cong. Rec. 1767 (1890).

The remarks of Senator Spooner also typify the concern of the 51st Congress for the damage done by price-fixing to individual consumers:

> Most if not all of the combinations ... aimed at by the bill, are detrimental to the public interest. I think of them all it will be agreed that two of them, whose ramifications extend throughout the whole country and who directly affect the people generally in the country, the sugar trust and what is called the beef combine, are infamous in their oppression, the sugar trust dealing with an article which goes into the daily consumption of the people, which goes into every house, to every family. I believe 52 pounds per year per capita are used by the people of the United States. The object of this

> trust is to keep up to consumers the price of sugar. The beef combine . . . has been so successful as to maintain at the war rate the price of beef to consumers throughout the United States . . . . 21 Cong. Rec. 2640.

There can be no doubt, then, that the 51st Congress recognized that consumers were injured by price-fixing even though they were one or more levels removed from the price-fixers in the chain of distribution. Since a consumer was, concededly, a "person . . . injured in his business or property," the debate in the 51st Congress centered on the means to facilitate consumer damage actions under the predecessor of section 4 rather than on whether the consumer should be allowed to sue at all.[4]

The requirement of jurisdictional amount was eliminated in antitrust damages actions, for example.

[4] In discussing an early version of the bill, for example, Senator Hiscock sarcastically questioned whether the remedy was sufficient to allow consumer redress and to deter violators:

> Now, then, let us look at the only remedy that the bill affords to an oppressed people.
>
> . . . .
>
> A person sues the corporation or the combination or party to the combination. . . . The middlemen will never commence these actions. I mean the parties who in the first instance purchase of the combination. That will be guarded against, and the people who are to suffer the damages are those who are distributed all over this broad land, the consumers of the merchandise/buying perhaps a hundred dollars' worth and damages possibly $10, and they have the right to follow this combination or a party to it wherever he is domiciled and recover twice the amount of damages they have sustained! 21 Cong. Rec. 2571 (1890).

See also id., at 3147-48 (1890) (Sen. George).

Senator Sherman explained that this was intended to permit suit by plaintiffs with small claims such as the individual consumers for whom Senators George and Spooner had expressed concern: "Those words were inserted with a view to giving a remedy to persons who had suffered in a minor degree."[5] 21 Cong. Rec. 2612 (1890). *Accord, id.*, at 3148-49.

There were a variety of proposed amendments which, though they were ultimately rejected, demonstrate further the congressional intent to extend a remedy to the individual consumer who necessarily purchased from the great trusts through middlemen. Senator Reagan, for example, twice offered amendments to vest state courts with concurrent jurisdiction to entertain claims under the predecessor of section 4. *Id.*, at 2612, 3146. The purpose behind this amendment was that "[m]en of ordinary means (and that is the class of men who are usually subjected to wrongs

[5] Senator Teller's argument in favor of waiving the jurisdictional amount demonstrates that this provision was bottomed on the desire to facilitate the claims of the individual consumer who, of course, purchased through a middleman:

> We want to give the United States courts jurisdiction without reference to the amount involved. It is the subject-matter simply that we want the court to have jurisdiction of, and not the amount, and if we limit the amount there is not one man out of a hundred who are damaged who will ever have an opportunity of getting redress. It may be that there will not be a case prosecuted where there is a large amount of damage. . . . I think we had better let the parties go into court on any amount. If they are damaged by these proceedings which we are about to declare illegal, they ought to be allowed to sue, no matter what the amount of damage may be.

of this kind) would not be able to employ lawyers and to take witnesses to the circuit court of the United States, and perhaps travel a great distance to reach there, in order to prosecute a suit for a few hundred dollars." *Id.*, at 3146. Though Senator Reagan's amendment was rejected, the rejection was solely because of doubts over the federal power to vest state courts with jurisdiction to hear federal penal actions and there was never any suggestion that the federal courts could not entertain suit by "men of ordinary means" who purchased from price-fixers through middlemen. *Id.*, at 3146-47. Other proposals to broaden the consumers' right to recover were rejected on a variety of grounds (*e.g.*, *id.*, at 3148), but never was there any suggestion that a consumer be barred from suit or that recovery be denied because the plaintiff did not deal directly with the price-fixer. Any such suggestion would have been contrary to the manifest congressional purpose of helping the consumer recover for the injury caused by the trusts.

Contrary to petitioners' narrow interpretation, therefore, the proponents of the forerunner of section 4 contemplated that plaintiffs such as the State of Illinois who had purchased through middlemen would be entitled to bring suit to recover for their injuries.[6]

[6] The most recent Congress has interpreted section 4 to allow claims by persons who purchased through middlemen. While the interpretation by the 94th Congress is not, of course, contemporaneous legislative history of either section 7 of the Sherman Act or section 4 of the Clayton Act, it is an interpretation of section 4 by a coordinate branch of government to which this Court should give appropriate deference.

Since this Court should apply the antitrust laws "in light of ... the economic realities with which its

In Pub. L. No. 94-435 (Sept. 30, 1976), Congress enacted a new section 4C of the Clayton Act to overrule in part this Court's decision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and to empower State Attorneys General to sue as parens patriae to recover damages on behalf of citizens of their respective States. The language of section 4C closely parallels that of section 4. Specifically, section 4C provides for monetary relief "for injury sustained by ... natural persons to their property by reason of any violation of the Sherman Act." The Senate version did not require "injury to property" but the House of Representatives insisted upon the language ultimately enacted to retain "traditional elements of private recoveries." Statement of "Appropriate Legislative Intention," Representative Peter W. Rodino, Sept. 16, 1976, *reported in* CCH Trade Reg. Rep. No. 249, ¶ 350.10 (Oct. 6, 1976). In adopting the language from section 4, Congress intended to allow recoveries by injured persons who did not purchase directly from the price-fixers:

> Thus, assuming the State attorney general proves a violation, and proves that an overcharge was "passed on" to the consumers, injuring them "in their property"; that is, their pocketbooks — recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or other middlemen. The technical and procedural agrument that consumers have no "standing" whenever they are not "in privity" with the price fixer, and have not purchased directly from him, is rejected by the compromise bill. Opinions relying on this procedural technicality ... are squarely rejected by the compromise bill. *Ibid.*

Congress used the language of section 4 because it understood that language to allow recoveries by plaintiffs who purchased through middlemen rather than directly from the price-fixers. That is an interpretation of section 4 to which this Court should give appropriate deference.

framers were concerned," *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968), the State of Illinois should not be denied the opportunity to prove its damages.

2. *The lower courts have rejected privity as a requirement in antitrust cases.* Though petitioners argue that "only the first or direct purchasers could recover" (Pet. Br. 8), this notion of privity has no more currency in antitrust law than it does in other areas of tort law.

In *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 595 (N.D. Ill. 1973), for example, Judge Decker answered the argument that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), had somehow imposed upon antitrust plaintiffs the additional requirement of proving privity:

> [T]he opinion nowhere specifically states that Hanover Shoe had standing *because* it was in 'privity' with United Shoe or that privity is a requirement of standing in private antitrust cases. In fact, this court has searched in vain for any discussion of the question of standing in the *Hanover Shoe* opinion. If the court there had intended to establish such a rule, it clearly would have said something about the recent and substantial body of authority which had reached a contrary conclusion and permitted suits under Section 4 of the Clayton Act by those not in 'privity' with the alleged antitrust violator.

Judge Decker concluded, "[I]t would be stretching *Hanover Shoe* beyond all recognition to hold that its rejection of the pass-on defense somehow returns Section 4 of the Clayton Act to the 'days when privity was king.' " 59 F.R.D., at 596.

Other lower courts have likewise rejected the argument of antitrust defendants that privity should be enshrined as an element of section 4.[7] This Court has

[7] *See, e.g., Yoder Bros., Inc. v. California-Florida Plant Co.*, 537 F.2d 1347, 1374 n.27 (5th Cir. 1976) (dictum); *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1165 (7th Cir. 1976); *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 197 (9th Cir. 1973), *cert. denied*, 414 U.S. 919 (1974); *Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir. 1967); *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487, 491 (2d Cir. 1948); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582-83 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Lefrak v. Arabian American Oil Co.*, 405 F. Supp. 597, 599 (E.D.N.Y. 1975); *Carnivale Bag Co. v. Slide-Rite Mfg. Co.*, 395 F. Supp. 287, 290-91 (S.D.N.Y. 1975); *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 863 (N.D. Cal. 1975) (buyer victim of price depression); *Midway Enterprises, Inc. v. Petroleum Marketing Corp.*, 1974-2 Trade Case. ¶ 75,200 (D. Md. 1974); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 1974-1 Trade Cas. ¶ 74,974 (S.D.N.Y. 1974); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 (D. Conn. 1973), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975); *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 597 (N.D. Ill. 1973); *Southern General Builders, Inc. v. Maule Industries, Inc.*, 1973-1 Trade Cas. ¶ 74,484 (S.D. Fla. 1972); *Washington v. American Pipe & Construction Co.*, 274 F. Supp. 961, 965 (W.D. Wash. 1967); *Missouri v. Stupp Brothers Bridge & Iron Co.*, 248 F. Supp. 169, 174 (W.D. Mo. 1965); *Washington v. General Electric Co.*, 246 F. Supp. 960, 962 (W.D. Wash. 1965).

Petitioners place heavy reliance on *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971), for the proposition that "absent pre-existing cost-plus contracts or similar pricing arrangements, indirect purchasers cannot sue and recover for overcharges; only the first purchaser can." Pet. Br. 12. *Mangano*, of course, stands for no such principle. The Court of Appeals was careful to observe that "the [*Mangano*] plaintiffs [had] an opportunity, of which they could or would not take advantage, to show that these overcharges became compo-

recognized that "[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). Accordingly, this Court should decline petitioners' invitation to engraft onto section 4 the anachronistic requirement of privity.

3. *The "target area" is the appropriate measure of a plaintiff's claim under section 4.* Despite the breadth of section 4, it is clear that "Congress did not intend the antitrust laws to provide a remedy in damages for every injury that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 n.14 (1972). It is the "target area" test which should be used for evaluating plaintiffs' entitlement to sue,[8] because this is the analysis most in

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nents of the prices they paid." *Id.* at 1188. Moreover, the Court of Appeals took pains to observe that the circumstances before it were unlike those in *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830 (3d Cir. 1962). 438 F.2d at 1188, n.1. In *Freedman*, the Court recognized that a businessman who priced on a markup system passed on an illegal overcharge. 301 F.2d at 833. *Mangano* applied the wholly uncontroversial rule of law that any antitrust damages claimant must present some evidence of impact in order to recover to a situation where the claimant had failed to disclose the availability of such evidence when required to do so.

[8] While this Court has not expressly approved the "target area" standard, lower courts have interpreted the decisions of this Court as an implicit endorsement of the standard. *E.g., In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 128 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), *citing Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *Midway Enterprises, Inc. v. Petroleum*

keeping with Senator George's concern for providing a remedy to "[t]he consumer [who] . . . pay[s] all . . . increased prices advanced by the middlemen and profits on same." 21 Cong. Rec. 1767 (1890).

To be actionable under section 4, the injury must be one resulting from "anything forbidden in the antitrust laws." Insofar as is relevant here, this involves whether injury to the particular plaintiff was foreseeable, namely, whether the plaintiff was within the "target area" of injury. The question of foreseeability

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Marketing Corp., 1974-2 Trade Cas. ¶ 75,200, at 97,398 (D. Md. 1974).

Although their application of the principle is not entirely uniform, the Courts of Appeal in the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits apply the target area or endangered zone standard. *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1361 (5th Cir. 1976); *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1164-65 (7th Cir. 1976) (injury within protected zone); *Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied* 423 U.S. 1073 (1976); *Malmud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975) (injury within protected zone); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 425-26 (9th Cir. 1975); *Carrol v. Protection Maritime Ins. Co.*, 512 F.2d 4, 9 (1st Cir. 1975); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 689 (8th Cir. 1966); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir.) *cert. denied*, 385 U.S. 934 (1966). The Third and Tenth Circuits apply a "direct injury" test. *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973); *Kauffman v. Dreyfus Fund*, 434 F.2d 727, 732-34 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). The District of Columbia Circuit has not identified its position, but apparently would permit plaintiffs such as respondents herein to present proof of their injuries. *See generally Illinois v. Bristol Meyers Co.*, 470 F.2d 1276, 1278 n.4 (D.C. Cir. 1972).

or "target area" is, at bottom, a concept taken from tort law: Is the plaintiff one who could reasonably have been foreseen to be injured by the anticompetitive actions alleged. Or, as one court has said, the question is whether the plaintiff is "within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

The "target area" analysis is akin to that used in other tort cases. The manufacturer of a wheel for an automobile can reasonably foresee that that wheel will be incorporated in an automobile, that the automobile will go through different levels of distribution and will eventually be purchased by its driver. If a defect in the manufacture of the wheel causes an injury to the driver, the manufacturer may properly be held accountable. *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). So, too, in the present case. Though manufacturers of concrete block sell to masonry contractors, it is reasonably foreseeable — indeed expected — that the concrete block will be resold by the middleman and incorporated in a building or other structure.[9] Since the middleman in the distribution of concrete block is in business to make a profit and therefore must recover his material costs when reselling the block, it is reasonable to presume that the actual user of the concrete block suffers most if not all of the consequences of any conspiratorial overcharges by block manufacturers. This, after all, was the rea-

[9] *See* Brief for the State of California as Amicus Curiae at 12-16.

soning of Senator George when he noted, "[T]he middleman ... buys to sell again. He buys only for profits on a subsequent sale. So whatever he pays he receives when he sells, together with the profit on his investment; and so on all of them; including the last, who sells directly to the consumer." 21 Cong. Rec. 1767 (1890).

The target area standard provides an important and workable limitation on antitrust claims and is one which is readily satisfied by Illinois' claim in the present case. Where a conspiratorial overcharge for goods is alleged, all purchasers of those goods or products containing those goods are within the foreseeable target area of the price-fixing even though their purchases may have been made through middlemen. "[I]t is a curious result to suggest that a large manufacturer, who normally produces his goods with the intention and expectation that they will be distributed throughout several market areas, cannot foresee that his illegal price-fixing conduct will affect parties remote from his immediate business contacts." Comment, 72 Colum. L. Rev. 394, 413 (1972). Where, on the other hand, the injury alleged is different in kind from the reasonably foreseeable consequences of the anticompetitive acts, then the target area standard may not be satisfied. *See, e.g., In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Stern v. Lucy Webb Hayes Nat'l Training School*, 367 F. Supp. 536, 539 (D.D.C. 1973).

The *Electrical Equipment Conspiracy Cases* demonstrate this distinction. Among the thousands of

different plaintiffs who sued in those cases were electric utilities which purchased generating equipment from the defendant manufacturers through middlemen and consumers of electric energy who did not themselves purchase any generating equipment but who sought recovery for the increased price of electricity resulting from the over-priced generating equipment. The electric utilities were allowed to assert claims even though they purchased the equipment through middlemen as part of their purchases of electric generation facilities. *E.g., Washington v. General Electric Co.*, 246 F. Supp. 960, 962 (W.D. Wash. 1965) ("this Court is unwilling to deny plaintiff its right to sue merely because it purchased the equipment through a third party rather than directly from the manufacturer"). *See also In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974) (purchasers of highways allowed to assert claims against producers of liquid asphalt which was combined with aggregate to make highways). The purchasers of electricity were in a different position, however. Unlike the electric utilities which purchased the price-fixed generators through middlemen as parts of electric generation facilities or Lake County which purchased price-fixed concrete block through middlemen as a part of its new nursing home (App. 235), consumers of electricity did not buy the conspiratorially priced product. Presumably, consumers of electricity paid higher prices because of the increased capital costs just as patients at the Lake County Nursing Home presumably paid higher prices because of the increased cost for concrete block. This interest did not bring them within the target area of the violation,

however. *See, e.g., Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963).

The difference between the electric utilities and the users of electricity thus illustrates the boundary between those within the target area and those without. This difference turns on whether the plaintiff purchases a product of the production process at least a portion of which was a conspiratorially priced input or whether his purchase was of a product the price of which was affected by a conspiratorially priced input but which did not physically include that input. Since the State of Illinois alleged that it "purchased . . . concrete block and . . . sustained damages as a result" (App. 7) it is within the foreseeable target area and should be allowed to proceed with proof of the amount of its injury.

C. *Hanover Shoe* is Consistent With the Target Area Standard

Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra, is fully consistent with the target area approach. *Hanover Shoe* involved overcharges for machinery used in the production of shoes. The plaintiff was the manufacturer of shoes and the defendant was the lessor of the machinery in question. There was no middleman between plaintiff and defendant nor did plaintiff resell the machinery to other purchasers. The plaintiff in *Hanover*, then, was the only purchaser within the target area and, as such, was entitled to recover the full amount of the overcharge.

The overcharge for the machinery in *Hanover Shoe* was reflected in increased general operating expenses

just as the overcharge in the electric generators was reflected in increased general operating expenses for the electric utilities. Presumably, some portion of this increased general operating expense could be recovered through increased prices for the shoes or electricity produced by the overpriced machinery. Purchasers of shoes and electricity, however, were not within the target area of injury for overcharges in machinery used to produce the shoes or electricity since they were not purchasers of the machinery. Since the purchasers of shoes and electricity were not — for this reason — within the relevant target area, it would have been inappropriate to inquire whether any overcharge was passed on to them.

The target area standard can thus be defined in terms of the recognized cost accounting principles relied upon by this Court in *Hanover Shoe*. Unlike overcharges in a product which is resold in either unaltered form or as an ingredient of another product, increased general operating expenses incurred as a result of overcharges on one or more inputs to the production process cannot readily be allocated to the output from that production process on a per unit basis. This Court recognized this fact in *Hanover Shoe* when it noted that "costs per unit for a different volume of total sales are hard to estimate." 392 U.S., at 493. There is, to be sure, some difficulty in estimating per unit costs for generating operating expenses since the unit cost for such expenses will vary with the volume of goods sold.[10] No such difficulty exists for component costs, however, because for all practical purposes component costs remain the same on a per unit basis without regard to the volume of goods sold.

Petitioners' complete reliance upon *Hanover Shoe* is therefore greatly misplaced. The facts there dealt with overcharges incurred in general operating expenses. Since the target area includes only those who purchase the overpriced product in either unaltered form or as an ingredient of another product and since the purchasers of shoes did not buy the overpriced machinery, no proof of pass-on was relevant there. *See, e.g., Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 315 F.2d 564 (7th Cir.), *cert. denied* 375 U.S. 834 (1963). *Hanover Shoe* did not present the situation involved in the present case where a price-fixed product was resold. In such situations, all purchasers of the price-fixed product are entitled to present proof of their respective damages. *E.g., In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

II

PROOF OF DAMAGES CAN PROCEED UNDER EVIDENTIARY STANDARDS RECOGNIZED AND APPROVED BY THIS COURT.

A. Because the Fact of an Antitrust Violation Makes Precise Proof of the Amount of Overcharge Problematic, This Court Has Ruled That an Antitrust Plaintiff Need Only Present Evidence for a "Just and Reasonable Estimate" of Damages.

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[10] There is no direct relationship between the cost of machinery used in shoe production and the ultimate cost of shoes.

Once the entitlement of a plaintiff to sue has been resolved, there remains the separate question of the proof of damages. Petitioners allude to unspecified but supposedly insurmountable problems of proof which would result if the actual users of conspiratorially priced products were allowed to seek redress for their injuries. Petitioners' argument is an attempt to turn the logic of the law on its head. Because the injuries were massive or because the price-fixing conspiracy was successful—so the argument goes—courts should not attempt the task of determining the amount of damages and should instead deny the injured suitor any relief. The decisions of this Court have consistently rejected such contentions and petitioners' argument here should likewise be rejected.

Proof of damages in price-fixing cases presents no unique or difficult problems. To be sure, if the price-fixing conspiracy were successful there would be no competitive price available to measure the amount of the unlawful overcharge. Defendants in antitrust damage actions commonly try to use this absence to their own advantage, contending that damages should not be assessed unless measured with demonstrable certainty. This Court has properly rejected these attempts to turn the success of an unlawful conspiracy into a shield from liability. Thus, in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), this Court said:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.[11]

This is so because time and units variables will control the number of shoes across which the cost of the machinery must be amortized. Until the machine's useful life is expended, the number of shoes to which its cost must be amortized is unknowable.

The Court reaffirmed this doctrine in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 266 (1946), accepting a "just and reasonable inference that [plaintiffs] were damaged by [defendants] action." *Accord, Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

One of the purposes of the antitrust laws is, after all, deterrence. This purpose would be ill-served if price-fixers or monopolists were allowed to retain their un-

[11] In other contexts, this Court has applied the same analysis in apportioning the burden of proof. "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). This Court has apportioned the risk of error in factfinding by shifts in the burden of persuasion depending on the relative interests at stake. *E.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Speiser v. Randall, supra; see also Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 362 (1972) (Douglas, J., dissenting) ("The nature of the rights implicated in the lawsuit thus determines the allocation and degree of the burden of proof and consequently the party upon whom the risk of errors in the factfinding process will be placed."). As this Court noted in *Story Parchment*, this risk of error in factfinding has been placed upon antitrust defendants whose unlawful acts "preclude the ascertainment of the amount of damages with certainty."

lawful gains. Beginning with cases such as *Story Parchment*, this Court has consistently fashioned evidentiary rules to avoid the "perversion of fundamental principles of justice [which would result if] . . . all relief [were denied] to the injured person, and . . . the wrongdoer [thereby relieved] from making any amend for his acts." *Hanover Shoe* is within this line of cases.

In *Hanover Shoe*, the only purchaser within the target area and therefore the only one entitled to assert a claim for relief was the shoe manufacturer which leased the overpriced machinery. If this particular plaintiff were denied the opportunity to recover the full overcharge, then the monopolist would, *pro tanto*, be "relieve[d] . . . from making any amend for his acts." In those circumstances where there was only one plaintiff entitled or able to sue, this Court barred evidence of pass-on because, if such evidence had been allowed,

> those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness. 392 U.S., at 494.

The analysis is essentially the same where, unlike *Hanover Shoe*, plaintiffs at more than one level of distribution are within the target area and bring suit. In such cases, the purpose of deterrence is obviously served when judgment is entered against the wrongdoers for "the fruits of their illegality." There remains, however, the additional purpose of the antitrust laws of compensating those actually injured. In cases of

plaintiffs at more than one level of distribution, this purpose is met by the division of the judgment between the different plaintiffs proportionate to their respective injuries. This is simply a matter of accounting, however, and is a concern solely between the different plaintiffs and one in which the alleged wrongdoer has no interest.[12] *Dickinson v. Rinke*, 11 Fed. R. Serv. 489, 490-91, 503 (S.D.N.Y. 1948), *aff'd sub nom. Dickinson v. Burnham*, 197 F.2d 973 (2d Cir.), *cert. denied* 344 U.S. 875 (1952). This Court has approved the presentation of evidence necessary to demonstrate the respective injuries sustained by different plaintiffs in such cases and the lower courts are familiar and experienced with considering such evidence.

B. Proof of Prices Paid for Unlawfully Priced Products at Different Levels of the Chain of Distribution Has Been Approved by This Court.

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[12] In administering class action antitrust cases, for example, the courts have repeatedly recognized that claimants on different levels of distribution have a common interest in establishing a violation of the antitrust laws, the impact of that violation, and, occasionally, the amount of the overcharge that the violator injected into the distribution system. The interests of purchasers on different levels diverge only when the question is how much of the overcharge was borne on each level. *See, e.g., In re Plywood Antitrust Litigation*, 1976-1 Trade Cas. ¶ 60,805 at 68, 482 (E.D. La. 1976) ("common interests in establishing . . . right to recover any damages on either of their parts"); *In re Gypsum Cases*, 1974-2 Trade Cas. ¶ 75,272 at 97,773 (N.D. Cal. 1974) (passing on and remoteness are "interclass differences"); *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278, 281 (S.D.N.Y. 1971) ("far simpler to prove . . . total damages [to class] . . . than . . . aggregating individual damage claims").

Apparently conceding that respondents are within the target area and are entitled to bring suit, petitioners state emphatically, "The issue here ... is not standing, but rather proof of injury and monetary damage." Pet. Br. 15. Petitioners argue that there are supposedly "insurmountable" evidentiary problems which require that this Court announce a new rule under which only middlemen and not the actual users would be entitled to assert claims for relief for price-fixing. *Id.*, at 20. Petitioners' visions of "insurmountable problems" in proving prices paid at different levels in the chain of distribution are wholly illusionary because this Court has previously approved treble-damage judgments based on such evidence and the lower courts regularly consider such evidence without difficulty.

Perkins v. Standard Oil Co., 395 U.S. 642 (1969), was decided only one term after this Court's decision in *Hanover Shoe*. In *Perkins*, this Court upheld a treble-damage jury verdict based upon evidence which traced the price from the defendant through two middlemen to a competitor of the plaintiff. This Court held that the evidence permitted the jury to find that the unlawful price had been passed through these multiple links in the chain of distribution. *Id.*, at 649. If proof of prices paid at different levels in the chain of distribution depended upon evidence as ethereal as petitioners claim, then the jury in *Perkins* would not have been able to return its verdict and this Court would not have been able to affirm the judgment entered on that verdict. That this Court affirmed the *Perkins* judgment is the most persuasive evidence that proof of the overcharge paid at different levels in the chain can be made with demonstrable clarity.

Nor have the lower courts experienced any difficulty in evaluating evidence of the overcharges paid at different levels in the chain of distribution. Indeed, the relative ease with which the lower courts deal with such evidence belies the spectre of "insurmountable" problems raised by petitioners. *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), illustrates the type of evidence with which the lower courts routinely deal. That case involved a price-fixing conspiracy in the sale of liquid asphalt which, when combined with aggregate to form asphaltic concrete, was used in highway construction. The plaintiffs there were state and local governments which purchased liquid asphalt through intermediary contractors just as respondents purchase concrete block through intermediaries in the present case. The bidding procedures used there were the same as those in the present case for the concrete block used in the construction of buildings. Relying on the depositions[13] and affidavits[14] before it, the Ninth Circuit

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[13] The deposition of Francis A. Lulay, a paving contractor, reflects the typical means by which the overcharge was passed on to the state and local governments:

> Q. Do you ever add on to that cost of that asphalt?
> A. We add a percentage on to everything.
> Q. What's the purpose of that?
> A. Profit.

Deposition of Francis A. Lulay at 20, *In re Western Liquid Asphalt Cases*, No. 50173 RES (N.D. Cal.)

[14] The affidavit of a contractor explained the manner in which the ultimate contract price was determined:

> 1. Each public road construction contract is composed of a number of separate items of work. Each item of work typi-

concluded that the amount of damages could be proved with the requisite certainty (487 F.2d, at 196 n.5) and that the plaintiffs were entitled to proceed to trial with their claims. *See also In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 (D. Conn. 1973), *appeal dismissed* 528 F.2d 5 (2d Cir. 1975).[15]

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cally is composed of certain material and labor costs. Certain items may also involve equipment costs.

2. The company uses a work sheet to compute the lowest costs to complete each item of work set forth in the contract. The company, in making its computation, ascertains in regard to each item, the actual cost, to the extent applicable, of the material, labor and equipment involved. The cost of those items of work to be covered by a subcontract, such as paving, is ascertained by obtaining bids from one or more subcontractors.

. . . .

5. The total bid price is arrived at by adding thereto additional amounts for overhead, contingencies and profit. These amounts vary from job to job.

487 F.2d, at 195 n.4.

[15] While dismissing the appeal from Judge Blumenfeld's ruling in *Master Key*, the Second Circuit expressed its agreement in his view that injury to actual users is susceptible of convenient proof:

> If the appellees establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee. *In re Master Key Antitrust Litigation*, 528 F.2d 5, 12 n.11 (2d Cir. 1975).

Nor does the fact that the price-fixed product may have been combined with other products before resale necessarily create insurmountable evidentiary problems. And, in the circumstances of this case, this fact certainly does not mean that a plaintiff's claim should be dismissed without the opportunity to pursue discovery to determine if any evidentiary problems do, in fact, exist. In *Western Liquid Asphalt*, after all, the price-fixed product was liquid asphalt. Even though the liquid asphalt was combined with aggregate to form asphaltic concrete which, in turn, was combined with other products and services to form the highways which the plaintiffs purchased, the Ninth Circuit had no difficulty in determining that the plaintiffs could prove their damages with the requisite certainty. *Accord, e.g., Armco Steel Corp. v. North Dakota*, 376 F.2d 206, 210-11 (8th Cir. 1967).

The ability to prove damages is a factual question. There will be cases such as *Western Liquid Asphalt* where the plaintiff can readily come forward with such proof and others such as *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971), *aff'g, Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), where the plaintiff is unable or unwilling to come forward with proof. A defendant moving for summary judgment has the burden of demonstrating the absence of any disputed issue of fact which would allow recovery. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970). Quite simply, petitioners here have not carried that burden and particularly in light of the stay of discovery by the District Court, sum-

mary judgment dismissing respondents' claims was improper on the present record.

III
THE CONGRESSIONAL POLICIES REFLECTED IN THE ANTITRUST LAWS WILL BE ADVANCED BY ALLOWING ALL PURCHASERS OF UNLAWFULLY PRICED PRODUCTS TO RECOVER FOR THEIR INJURIES UNDER APPROPRIATE STANDARDS

A. Allowing All Purchasers of Unlawfully Priced Products the Right to Recover Their Provable Damages Will Encourage the Private Enforcement of the Antitrust Laws.

Private enforcement of the antitrust laws serves the dual purpose of providing a deterrent to antitrust violators and compensating those injured by reason of antitrust violations. *E.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968). If all purchasers of unlawfully priced products were entitled to bring suit, then both purposes would be best served because the maximum deterrence would be provided and the competing claimants could share any recovery proportionate to their respective injuries. If only those in actual privity with the price-fixers were allowed to sue, however, both purposes would be ill-served because such parties would often have affirmative reasons for not bringing suit and, even if they did sue, they would often recover windfalls at the expense of subsequent purchasers in the chain of distribution who most likely bore the full measure of any overcharge.

Those who purchase directly from price-fixers are an improbable group upon whom to place the entire responsibility of private antitrust enforcement. As Senator George noted, those who purchase directly from price-fixers may actually profit by the continuance of the conspiracy through their own mark-up pricing practices. In any event, their business relationships with their suppliers would certainly be threatened if they were to sue their suppliers for price-fixing. In *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), the Ninth Circuit cited such reasons as the explanation for the general failure of the immediate purchasers to sue those who had fixed the price of liquid asphalt:

> It is understandable that contractors might not sue, in view of (1) their alleged dependence upon appellees for their suppiy of asphalt, (2) the possibility that they earned a percentage profit on the overcharges, and (3) the control and interdependence alleged between appellees and the contractors. Thus if the present appellants could establish antitrust violations but were precluded from recovering, no one else would sue, and appellees would retain their assumedly illegal profits.

In the name of deterrence, this Court has rejected holdings which would allow "those who violate the antitrust laws by price fixing or monopolizing [to] retain the fruits of their illegality because no one was available who would bring suit against them." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). So, too, should this Court reject a holding which would limit relief to those in privity with the wrongdoers because such a group might well

have affirmative reasons for not bringing the wrongdoers to the bar of justice. *See generally* Wheeler, *Antitrust Treble Damage Actions: Do They Work?* 61 Cal. L. Rev. 1319 (1973).

Deterrence is not the only end to be served by private antitrust enforcement. As petitioners themselves correctly note, "If deterrence were the only objective, then in logic any plaintiff willing to file a complaint would suffice." Pet. Br. 16 *quoting Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703, 717 (1974). The need to compensate those injured by antitrust violations also determines who is entitled to bring suit under section 4. To afford adequate compensation, all injured parties should have the right to bring suit. Recovery certainly should not be limited to those which as a group are the least likely to have been injured by unlawful overcharges.

The original debates on the Sherman Act recognized that the injury caused by price-fixing was not necessarily limited to those who purchased from the price-fixers for resale. As Senator George argued, "An advance in the price to the middleman is not mentioned in the bill for the obvious reason that no such advance would damnify them; it would rather be of benefit, as it would increase the value of the goods he has on hand." 21 Cong. Rec. 1767 (1890). The decisions in the lower courts bear out Senator George's analysis. Both the lower courts[16] and potential claimants[17] recognize

[16] *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 at 94,980 (D. Conn. 1973).

[17] In *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 746 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1075 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), for example, the District Court found that the first purchasers were often unwilling even to share in a recovery because they knew they had not been injured:

> The attitude of the members of the wholesaler-retailer class indicates no real damage to them.
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> . . . [A]bout 1500 members excluded themselves from the class. We are told by those opposed to the present allocation that 'some 1,500 claim forms [were] returned with statements by druggists that they were not damaged[d] and therefore wished to make no claim.' Several such statements by druggists were read into the record (SM 371-374). Typical is this statement from a druggist in Wisconsin (SM 372):
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> > Any pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists.

that those who purchase for resale intend a profit for their endeavors and therefore seek to recover any overcharges they pay from their customers.

None of this is to say, however, that only the last purchaser should be entitled to sue under section 4 or that persons who purchase for resale should never be allowed to assert claims. Wooden rules of that sort confuse the right to assert a claim with proof of damages and would not accomplish the stated purpose of section 4 to allow recovery for "injur[y] in . . . business or property." Rather, all parties within the target area should be afforded the right to present evidence of their damages.

B. Allowing All Purchasers of Unlawfully Priced Products the Right to Recover Their Provable Damages Will Not Result in Duplicative Recovery.

Petitioners' fear of duplicative recoveries if purchasers not in privity with violators may recover is wholly illusory. It is not surprising that there is no reported case in which an antitrust defendant claimed that he had been the victim of actual duplicative judgments, for the procedures available under the Federal Rules of Civil Procedure and the Judicial Code and the substantive rules governing damage awards make the possibility of duplicative recoveries highly speculative.

Duplicative recoveries could only arise if claims for the same damages were allowed to proceed separately. Defendants facing such separate, overlapping claims have ample incentive to seek their consolidation and the procedural tools for effecting such consolidation are readily available. The central thrust of modern procedural techniques for joinder of claims and parties and consolidation of actions is to assemble litigation into units susceptible of efficient and just resolution. To the extent that the actions from which duplicative recoveries might result are pending simultaneously in the same or different forums, these techniques will permit consolidation of the actions by middlemen and actual users before a single court in a single action.

Consolidation under 28 U.S.C. § 1407 (1970) is perhaps the most obvious method of bringing different plaintiffs before the same court. The requisites for such transfer will almost invariably be present when purchasers on different levels of distribution seek to

recover for the same overcharge. Common questions of fact on liability and the amount of the overcharge will be present if recovery is sought for the same overcharge by different plaintiffs, and the threat of duplicative recoveries will insure that transfer to a single district "will promote the just and efficient conduct of such actions." *Id.* § 1407(a). *See, e.g., In re Sta-Power Industries, Inc. Securities & Antitrust Litigation*, 404 F. Supp. 476, 477 (J.P.M.L. 1975); *In re Caesar's Palace Securities Litigation*, 385 F. Supp. 1256, 1258 (J.P.M.L. 1974); *In re Kauffman Mutual Fund Actions*, 337 F. Supp. 1337, 1340 (J.P.M.L. 1972). Actions transferred to a single district for pretrial purposes under § 1407(a) may also be transferred to that district for trial pursuant to 28 U.S.C. § 1404(a) (1970). *See, e.g., Pfizer Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); *In re Master Key Antitrust Litigation*, 1975-1 Trade Cas. ¶ 60,377 (D. Conn. 1975).

Once in the same forum, consolidation is available under Rule 42, Federal Rules of Civil Procedure. If it is the actual user who is suing and the defendant fears the possibility of a duplicative recovery by a middleman who has not yet brought suit, joinder may be compelled under Rule 19, Federal Rules of Civil Procedure.

When the different claimants within the target area have been brought together in the same forum, the theoretical possibility of duplicative recoveries vanishes. At this stage the task is to determine the total overcharge for which the defendant is liable and then to apportion this sum among the different claimants in proportion to their respective injuries. *See Washing-*

ton v. American Pipe & Construction Co., 274 F. Supp. 961 (W.D. Wash. 1967).

Dickinson v. Burnham, 197 F.2d 973 (2d Cir.), *cert. denied* 344 U.S. 875 (1952), is an example of this two-step procedure of first determining the total injury caused by the overcharge and then dividing the damage award proportionately among the different claimants. That was a case where the District Court first awarded a judgment in favor of the group of claimants as a whole and then directed that they submit claims against the fund so created. *Dickinson v. Rinke*, 11 Fed. R. Serv. 489, 490-91 (S.D.N.Y. 1948), *aff'd sub nom. Dickinson v. Burnham, supra*. The District Court expressly rejected the argument that each claimant must prove his claim separately against the defendant. 11 Fed. R. Serv., at 501. Addressing the action taken by the District Court, the Second Circuit said:

> Obviously its solution was an eminently practical one; it declined to allow the wrongdoers to escape for some theoretical protection to or against persons who after all these years and having failed to respond to notice were surely not actually disposed to claim participation. By taking charge of the fund as it did, it afforded all necessary protection to the plaintiff while making a fair distribution to the actual parties in interest. And the result seems not merely practical, but legally sound. 197 F. 2d, at 979-80.

Other courts have reached the same conclusion. *E.g., Pfizer, Inc. v. Lord*, 449 F.2d 119, 120 (2d Cir. 1971); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 281, 288-89 (S.D.N.Y. 1971); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 715 n.15, 716, 63 Cal. Rptr. 724, 738 n.15, 739, 433 P.2d 732, 746 n.15, 747 (1967).

In sum, modern procedures adequately protect wrongdoers from the possibility of duplicative recoveries. Antitrust cases involving the passing on of an overcharge through an intermediate purchaser pose no threat of duplicative liability that cannot be avoided through available and tested procedural techniques. *Minnesota v. U.S. Steel Corp.*, 299 F. Supp. 596, 608 (D. Minn. 1969), *rev'd on other grounds* 438 F.2d 1380 (8th Cir. 1971). Petitioners may conjur up hypothetical cases in which duplicative recovery could occur, but they can do no more than cite a parade of imaginary horribles. In the absence of an actual case of duplicative recovery, the speculation urged by petitioners should not provide a basis for denying recovery to persons actually injured.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

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